

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

LOWEY DANNENBERG COHEN, P.C., in its
capacity as account holder of, and party with
interest in, the REZULIN SETTLEMENT FUND,

Plaintiff,

- vs -

JAMES R. DUGAN, II, STEPHEN B. MURRAY
d/b/a THE MURRAY LAW FIRM, RAWLINGS
AND ASSOCIATES, PLLC, GREG MURPHY,
MORAIN & MURPHY, LLC, WALLACE
JORDAN RATLIFF & BRANDT, LLC,
ELWOOD S. SIMON & ASSOCIATES, P.C.,
KERSHAW, CUTTER & RATINOFF, LLP,
BERMAN DEVALERIO PEASE TABACCO
BURT & PUCILLO, MARK FISCHER, GEORGE
RAWLINGS, SHIPMAN & GOODWIN LLP,

Defendants.

Case No. 08 Civ. 0461 (LAK)

ECF CASE

DECLARATION OF THOMAS M. SKELTON

I, THOMAS M. SKELTON, declare under the penalty of perjury pursuant to 28 U.S.C.

§ 1746, that:

1. I am an attorney admitted to practice in New York and before this Court, and am a shareholder of Lowey Dannenberg Cohen & Hart, P.C., counsel *pro se* for Plaintiff Lowey Dannenberg Cohen, P.C., in its capacity as account holder of, and party with interest in, the Rezulin Settlement Fund (the "Fund") and I am familiar with all the facts and circumstances in this action.

2. On January 31, 2008, this Court held a hearing on Plaintiff's motion for a preliminary and permanent injunction at which the Dugan Defendants appeared through counsel

(Dane Ciolino) and participated in oral argument. A true and correct copy of the Transcript from the January 31, 2008 hearing is annexed hereto as Exhibit 1.

3. Since January 31, 2008, I have been the sole contact at Lowey Dannenberg for communications with Mr. Ciolino on this matter.

4. After the hearing on January 31, 2008, the next communication between Plaintiff and the Dugan Defendants occurred on February 7, 2008, when Plaintiff served very targeted discovery requests on the Dugan Defendants, and proposed that the parties agree to exchange Rule 26(a) disclosures by email on February 20, and responsive documents by email on February 20.

5. The Dugan Defendants did not respond to my February 7th letter.

6. Eight days later, on February 15, 2008, I called Mr. Ciolino and left him a voice mail message to follow up on my February 7, 2008 proposal.

7. Five days later, on February 20, 2008 (after receiving a copy of a stipulation Plaintiff entered into with other defendants), Mr. Ciolino finally returned my call, but stonewalled me. Mr. Ciolino recognized the need to move promptly with discovery due to the March 31, 2008 discovery cut-off, but told me that he would need more time to discuss the matter with his clients and was unable to commit to a proposed schedule at that time.

8. Between January 31, 2008 and the filing of Plaintiff's default motion on February 27, 2008, there were no other contacts between Lowey Dannenberg and counsel for the Dugan Defendants.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: March 7th, 2008
White Plains, New York


THOMAS M. SKELTON

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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 LOWEY DANNENBERG COHEN, PC,

4 Plaintiff,

New York, N.Y.

5 v.

08 Civ. 461 (LAK)

6 JAMES R. DUGAN, II, et al.,

7 Defendants.

8 -----x

9 January 31, 2008
10 2:50 p.m.

11 Before:

12 HON. LEWIS A. KAPLAN,

13 District Judge

14
15 APPEARANCES

16 LOWEY DANNENBERG COHEN, P.C.
Attorneys for Plaintiff

17 BY: RICHARD W. COHEN
18 THOMAS M. SKELTON
J. PETER ST. PHILLIP

19 DANE S. CIOLINO
20 Attorney for Defendants Dugan and Murray

21 WALLACE, JORDAN, RATLIFF & BRANDT, LLC
22 Attorneys for Defendant Wallace, Jordan, Ratliff & Brandt
23 BY: MICHAEL J. VELEZIS
24 KIM WEST
25

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16 LOWEY DANNENBERG COHEN, P.C.

Attorneys for Plaintiff

17 BY: RICHARD W. COHEN

THOMAS M. SKELTON

18 J. PETER ST. PHILLIP

19 DANE S. CIOLINO

20 Attorney for Defendants Dugan and Murray

21 WALLACE, JORDAN, RATLIFF & BRANDT, LLC

22 Attorneys for Defendant Wallace, Jordan, Ratliff & Brandt

23 BY: MICHAEL J. VELEZIS

KIM WEST

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1 (Case called)

2 THE DEPUTY CLERK: Plaintiff, are you ready?

3 MR. COHEN: Yes, your Honor.

4 THE DEPUTY CLERK: Defendant Wallace Jordan's firm,
5 are you ready?

6 MR. VELEZIS: Yes, your Honor.

7 MS. WEST: Yes, your Honor.

8 THE COURT: Defendants Dugan and Murray, are you
9 ready?

10 MR. CIOLINO: Yes.

11 THE COURT: Mr. Skelton, is it? Who is for the
12 movant?

13 MR. COHEN: Mr. Cohen, Richard Cohen.

14 THE COURT: Mr. Cohen.

15 MR. COHEN: Thank you, your Honor.

16 Your Honor, before I begin argument, just a couple of
17 preliminary matters. On request of defendants Wallace Jordan,
18 we move their admission *pro hac vice*. We hope that the court
19 would agree that --

20 THE COURT: I will hear them, but they have to make
21 the motion on papers and pay the fee.

22 MR. COHEN: We did. We submitted the papers in the
23 Clerk's Office and paid the fee.

24 THE COURT: Then it will go to the Part I judge, but I
25 will hear them.

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1 MR. COHEN: Thank you, your Honor.

2 Secondly, we wanted to hand up an additional piece of
3 evidence which we gave to Mr. Ciolino before the argument, and
4 he has consented. It is a letter that he sent to counsel which
5 represented us in the Louisiana action which we believe is
6 relevant to the proceedings.

7 THE COURT: Okay. Hand it up.

8 MR. CIOLINO: No objection, your Honor.

9 THE COURT: Go ahead. Do it.

10 MR. COHEN: Thank you, your Honor.

11 THE COURT: Mr. Cohen.

12 MR. COHEN: Yes, I just lost my legal pad, if you give
13 me second.

14 THE COURT: That's okay. My secretary just brought
15 mine down.

16 MR. COHEN: Found it.

17 Your Honor, before the court today are the Dugan
18 defendants' motion to dismiss. As to that, Mr. Ciolino and I
19 spoke before argument, and I believe Mr. Ciolino has agreed
20 that that is now moot by virtue of our having deposited the
21 fund with the court.

22 THE COURT: Is that right, Mr. Ciolino?

23 MR. CIOLINO: Your Honor, I believe it is moot because
24 they filed an amended complaint that cured many of the problems
25 that we raised with the original complaint. Our time for

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1 filing a responsive pleadings I think runs until February 18.
2 At that point we will evaluate whether to file a motion to
3 dismiss the amended complaint. But as to the original
4 complaint, I agree with Mr. Cohen that it is moot.

5 THE COURT: All right. The motion to dismiss the
6 original complaint is denied as moot.

7 MR. CIOLINO: Thank you.

8 MR. COHEN: So, your Honor, we are here now on a
9 motion for an injunction pursuant to 28 U.S.C. 2361, which is
10 the enforcement mechanism to prevent competing litigation in an
11 instance where the court has proper interpleader jurisdiction.

12 THE COURT: From your point of view, is this statutory
13 interpleader alone or rule and statutory interpleader?

14 MR. COHEN: It is statutory interpleader alone, your
15 Honor.

16 THE COURT: Why is that?

17 MR. COHEN: That is how we pleaded it. I am certainly
18 willing to be educated, but. . .

19 THE COURT: Rule 22 says that where you have, I think
20 it says where you have at least \$75,000 in controversy and a
21 risk of multiple liability, you can pursue interpleader under
22 the rule. Among the differences are two: One is you don't
23 have to deposit the money, and the second is that the standard
24 by which diversity of citizenship is assessed is different than
25 it is under the statute. So I was just curious.

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1 MR. COHEN: We pleaded it under the federal statute to
2 gain advantage certainly of the minimal diversity requirements.
3 Even though we are diverse from every defendant, we believe,
4 you never know.

5 THE COURT: So then on the face of the complaint, you
6 satisfied the diversity requirement for rule interpleader also,
7 as I understand it.

8 MR. COHEN: And nobody has contested that, your Honor.

9 THE COURT: All right.

10 MR. COHEN: The reasons for granting the injunction
11 are those that are present in virtually every 28 U.S.C. 1335
12 case, and we are asking today for a preliminary and permanent
13 injunction because we argue that we have satisfied clearly the
14 requirements of 1335. They are established by the documents
15 annexed to the declarations we have submitted in the verified
16 complaint. We have shown that there is a finite pot of money
17 that represents the fees generated by the settlement of the --

18 THE COURT: I wanted to focus on that for a minute.

19 I know your papers say somewhere that under the plan
20 of allocation, four and a half million dollars was earmarked as
21 the fees, and that's what went into the account, which then
22 grew modestly through interest.

23 But is the plan of allocation anywhere in the record?

24 MR. COHEN: It is not, your Honor. We have that. It
25 is in privileged communications which we would submit to the

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1 court. We would prefer that it be submitted *in camera* because
2 it was in the form of two advisory memoranda to all of the
3 clients explaining all of the terms of the settlement. We do
4 have with us redacted versions of those two memoranda, which
5 just show the plan of allocation -- the date of the memoranda,
6 who sent it, to whom it was sent, the headings, and then the
7 plan of allocation, which shows that in fact it was \$4,450,000
8 that was allocated to attorneys' fees. There was \$275,000
9 allocated to each of the two litigating insurers -- that was
10 Louisiana Blue Cross and Eastern States Health and Welfare
11 Plan. That came out of the \$5 million pot, leaving \$4,450,000
12 allocated to attorneys' fees, and that was explained to every
13 client as a plan of allocation, which was assented to by all of
14 them.

15 THE COURT: All right. Go ahead.

16 MR. COHEN: That money has never been touched. It
17 remained in our account until we deposited it with the court.
18 We have not taken a penny.

19 So there is a finite pot that is available for the
20 fees for the nine law firms to claim against, which reside in
21 eight different states. We are already subject to litigation
22 in one state court. It is a leak that can spring in two,
23 three, four, five, six, seven, eight, although the standard is
24 such that multiple fora is satisfied by litigation in two
25 courts. We are certainly subject to the risk of multiple

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1 litigation.

2 And that's all there is, Judge. There is the 4.5
3 million that's sitting in the court. That's the only source to
4 pay these fees. Nine firms have claims against it. They all
5 should have their *quantum meruit* assessment against it. I
6 don't have more fees to give Mr. Dugan or two other claimants.

7 I am not proud to be here today, having a fee dispute
8 in front of a federal district judge. It is not anything I
9 have done in 28 years of practice. It's something I hope never
10 to do again. I do understand that it is more routine practice
11 in some fora, but it is not what we like to do. We have always
12 been able to work these out. But unfortunately this time we
13 couldn't. We pursued two months before this *res* came into
14 existence. We deposited it into the court as soon as your
15 Honor determined that the Louisiana action couldn't stay here
16 because you lacked federal subject matter jurisdiction.

17 We have provided the court with that federal subject
18 matter jurisdiction through 28 U.S.C.1335. The case law,
19 including your Honor's case in the Charleston Library matter,
20 the Western District of New York case of Mitchell, I believe --
21 no, that's your case -- Bank of New York v. Crawford, all those
22 cases recognize the propriety of the injunction to stop there
23 from being competing litigation once the court has assumed
24 litigation over the *res* in an interpleader action. In fact,
25 the Second Circuit in I think it is the FDIC v. Four Star

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1 Holding case, 178 F.3d 97, recognized that "the federal court,
2 having custody of property in an *in rem* action, has exclusive
3 jurisdiction to proceed."

4 I would read 2361 the same way, your Honor, in that it
5 says that "in any civil action of interpleader under 1335, such
6 district court shall hear and determine the case."

7 Under *Colorado River*, this court, I'm sorry to put
8 this at your feet, but this court has the unyielding
9 obligation, unflagging obligation to exercise its jurisdiction.
10 So it will be heard here. It is only destructive to allow
11 competing litigation to go forward in Louisiana which, by the
12 Dugan defendants' own admission, involves this exact *res* and
13 nothing but this *res*.

14 If your Honor looks at Exhibit 5, it is my
15 declaration, which is the Dugan defendants' citation filed in
16 the Louisiana parish court, the preamble of that complaint
17 says, "This is a petition for damages, *quantum meruit*,
18 concursus and injunctive relief relating to legal fees to be
19 allocated in the matter of Louisiana Health v. Warner Lambert,"
20 and then it cites the case number.

21 The petition filed by the Dugan defendants in
22 Louisiana goes on to say, at paragraph 17, and this is Exhibit
23 5 to my declaration, their complaint, "In July 2007, Pfizer and
24 the clients represented by the petitioners reached a tentative
25 settlement of the resident litigation. This settlement will

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1 result in the division of a substantial legal fee among the
2 lawyers participating in the Rezulin litigation including the
3 parties to this lawsuit."

4 Your Honor, I would argue that that is their admission
5 and recognition that there were other parties with a right to
6 claim in this fund. We were not named in their petition. We
7 have taken the step now of bringing all of those parties before
8 this court. Every one of them has submitted a declaration now
9 assenting to the jurisdiction of this court, not that that is
10 legally necessary if the court has jurisdiction under 1335 and
11 2361, but every one every them also, with the exception of
12 Mr. Murphy, who is down in Baton Rouge, asserts that it or he
13 or she is not subject to the jurisdiction of the Louisiana
14 court, and every one of those declarations asserts a competing
15 claim to the fund.

16 So we have all of the elements of 1335. So we meet
17 the injunctive standards, your Honor, the irreparable harm that
18 your Honor recognized in the Mitchell case of being subject to
19 competing litigation.

20 We have prevailed on the merits in the sense that it
21 is -- the merits being that it is a proper interpleader, not
22 the merits that we are entitled to this much or the Dugan
23 defendants are entitled to that much, but it is a proper
24 interpleader, adverse claimants with minimal diversity, more
25 than \$500 at stake, the *res* deposited with the court.

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1 Under those circumstances, your Honor, we argue that
2 we are entitled to the injunction. And we also would add, your
3 Honor, that when we got the TRO, we personally, our law firm,
4 posted a \$500,000 bond which, now that the entire res of 4.5
5 million that everyone is contesting has been deposited with the
6 court, we would ask your Honor to waive that bond requirement
7 going forward. There is adequate security for the payment of
8 everybody's claims now, and it is a punishing burden for a
9 small firm like ours --

10 MR. CIOLINO: We would have no objection to that.

11 THE COURT: All right.

12 All right. Anything else?

13 MR. COHEN: Thank you, your Honor.

14 THE COURT: All right. Mr. Ciolino.

15 MR. CIOLINO: Thank you, your Honor. Good afternoon.

16 The way the proceedings stand now, I am not sure there
17 is a lot that we disagree on. We filed our opposition in
18 January, January 23, last week, raising a number of problems
19 with the original complaint. On Monday, on the 28th, the
20 plaintiffs cured many of the problems that existed with that
21 original complaint. They have deposited the funds in the
22 registry of the court on January 25.

23 THE COURT: Lets focus on what, if any, problems
24 remain.

25 MR. CIOLINO: Again, I think we would agree that now

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1 that the requirements have been met, that this court has
2 subject matter jurisdiction and personal jurisdiction. But it
3 all really turns on this, your Honor, that although the court
4 does have jurisdiction, since interpleader is an equitable
5 action, the court has the discretion, if it so chooses, not to
6 entertain the matter, even though it has jurisdiction. And the
7 court, the Second Circuit, in Truck-A-Tune v. Ray, 23 F.3d 60,
8 from 1994, said exactly that. The availability of jurisdiction
9 in an interpleader matter doesn't necessarily mean that the
10 court has to -- that the equities warrant federal adjudication,
11 to use the Second Circuit's language.

12 So I guess the only issue is should this court take
13 this matter when it could exercise its equitable discretion to
14 decline federal adjudication and, for these reasons, I would
15 submit to your Honor that it is appropriate that you decline as
16 a matter of your equitable discretion to hear this case.

17 This interpleader really is the most recent effort by
18 these plaintiffs just to secure this forum. They removed the
19 case from the District Court in Louisiana to the Eastern
20 District of Louisiana. Once it was in the Eastern District of
21 Louisiana, they MDL'ed the case here.

22 This dispute was an ordinary civil action, it's been
23 an ordinary civil action for six months. There was no need for
24 an interpleader, at least according to what the defendants, now
25 the plaintiffs, filed on August 10, when they removed the case.

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1 There was no need for interpleader on August 17, when they
2 filed their answer in the Eastern District of Louisiana. There
3 was no need for interpleader in September, when they sought and
4 obtained the MDL transfer. The first necessity that they
5 articulated for interpleader was January 17, which happened to
6 be the day after your Honor remanded the case to the Civil
7 District Court in Orleans Parish.

8 The fact is, there is no need for interpleader in this
9 case. The Dugan defendant --

10 THE COURT: It seems to me that that chronology is
11 quite supportive of the plaintiff, not you.

12 MR. CIOLINO: Well --

13 THE COURT: Because up to that point, the plaintiff
14 had every reason to believe that the matter would be resolved
15 in the MDL right here where we are today.

16 MR. CIOLINO: Well, as an ordinary civil proceeding,
17 not as this equitable interpleader action. And, in fact, if
18 there was a problem, if there wasn't everybody before the court
19 necessary for adjudication, we would have heard something under
20 Rule 19 that necessary or indispensable parties weren't joined,
21 but we didn't hear anything of that sort, your Honor, until
22 now.

23 THE COURT: Rule 19 is not a waivable defect, right?

24 MR. CIOLINO: You would have expected that they would
25 have raised a Rule 19 problem if that was really an issue.

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1 What they really want is this forum, and this is a fine forum.

2 THE COURT: It certainly makes a certain amount of
3 sense, don't you think? I have only had 17 or 1800 cases here,
4 including the case or cases concerning which the fee dispute
5 pertains.

6 MR. CIOLINO: Absolutely, your Honor, but this is
7 really just a dispute among lawyers. It doesn't have anything
8 to do with the --

9 THE COURT: It might have a little something to do
10 with what services were rendered and the quality thereof, don't
11 you think?

12 MR. CIOLINO: Absolutely it does.

13 THE COURT: You think the judge in Louisiana is better
14 informed on that than I am?

15 MR. CIOLINO: Well, no, your Honor. It is really just
16 a matter of whether or not it is appropriate for your Honor to
17 keep the case. And if, obviously, your Honor thinks so, then
18 here we are, and we will be prepared to deal with that on the
19 merits at the appropriate time. We don't object to the
20 continuance of the TRO or the preliminary injunction until your
21 Honor rules on our motion to dismiss, which --

22 THE COURT: Right now there isn't one.

23 MR. CIOLINO: No. Our time for answering or
24 responding to the amended complaint is February 18, and we
25 certainly don't have any problems with continuing TRO and

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1 preliminary injunction until such time as we file that motion
2 to dismiss. And the motion to dismiss, your Honor, is going to
3 be based entirely on the same argument, that there is, for
4 these reasons, good justification for the court exercising its
5 discretion not to keep the matter.

6 THE COURT: I always appreciated frankness when I was
7 at the bar on the part of judges, and obviously if you want to
8 make that motion, I am not going to stop you, and I certainly
9 don't foreclose the possibility that your advocacy will be so
10 fabulous that I will be swept off my feet or perhaps learn
11 something I don't know today. It wouldn't be the first time.
12 But based on what I know today, you might as well save the cost
13 of the ink and the postage.

14 MR. CIOLINO: I appreciate that judicial frankness,
15 and I guess what we will do is then just figure out when we are
16 going to set this thing for a trial on the merits.

17 THE COURT: Sounds like it. Okay.

18 MR. CIOLINO: Thank you.

19 THE COURT: Thank you.

20 Anyone else wish to be heard?

21 MR. VELEZIS: Good afternoon, Judge. My name is
22 Michael Velezis. I am a member of and represent the law firm
23 of Wallace, Jordan, Ratliff & Brandt, based out of Birmingham,
24 Alabama. We stipulate to this court's jurisdiction and we join
25 with the plaintiffs in requesting that you grant the injunction

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1 and keep this case and help these lawyers resolve this fee
2 dispute.

3 The only thing different I have to add, Judge, is we
4 are -- the Wallace Jordan defendant is different than every
5 other defendant. No one here has claimed that we are a party
6 of or involved in, in any way, this joint venture. We are here
7 because Pfizer insisted on one global settlement transaction,
8 and our money, our six clients, the fees we have incurred and
9 earned in representing six clients exclusively is in part of
10 that 4.5 million or whatever the res is. I think I am being
11 truthful in saying that it is undisputed that no one claims
12 that Wallace Jordan was involved in any joint venture or,
13 stated another way, that no one claims that they are entitled
14 to a portion of Wallace Jordan's fees. I just wanted to bring
15 that up front to the court.

16 Thank you.

17 THE COURT: Thank you.

18 Anyone else?

19 All right. I am ready to rule on this now.

20 I have before me in this action for interpleader a
21 motion by the plaintiff for a preliminary injunction which,
22 broadly speaking, wishes to enjoin any other litigation
23 concerning the fund, including, without limitation, an action
24 brought by certain of the defendants in the state court in
25 Louisiana, which I will refer to in my subsequent remarks as

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1 "the Louisiana case." I use that as a term of art.

2 The background is that Warner Lambert and/or Pfizer
3 came to market a number of years ago with an ethical drug
4 indicated for the treatment of diabetes, the trade name of
5 which was Rezulin. The drug was on the market for a period of
6 time. There were reports of some problems with what I recall
7 as being a quite small subset of patients who had taken
8 Rezulin. The drug was ordered off the market in the
9 United Kingdom. Pfizer then withdrew the drug from the United
10 States market.

11 The withdrawal of the drug was followed by an
12 avalanche of products liability litigation in both state and
13 federal courts. The judicial panel on multidistrict litigation
14 consolidated all of the federal cases in this court, ultimately
15 before me, pursuant to 28 U.S.C. 1407.

16 Among the cases that ultimately were consolidated
17 before me for that purpose were two lawsuits that, if memory
18 serves, also originated in Louisiana, one of them brought by --
19 I take that back. One of them originated in New York. The one
20 that originated in New York was the Eastern States case, and
21 the one that originated in Louisiana was brought by Louisiana
22 Blue Cross, if memory serves.

23 There were lots of lawyers involved in those cases,
24 as, indeed, there were in the whole MDL. The course of those
25 cases was somewhat complicated. I initially granted a motion

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1 to dismiss the complaints. That was appealed to the Court of
2 Appeals. The Court of Appeals reversed.

3 It came back. There was discovery. The allegations
4 on which the Second Circuit relied in reversing the dismissal
5 turned out by and large to have very little basis in fact, and
6 I granted the motion for summary judgment the second time
7 around. That was appealed.

8 During the pendency of the appeal, a complex global
9 settlement was worked out that involved payment by Pfizer to
10 not only the litigating insurance company plaintiffs, but a
11 large number of others that was, if memory serves me correctly,
12 in the neighborhood of \$17 million, the money to be distributed
13 pursuant to a plan of allocation that was not in the original
14 settlement agreement. It was either in some side agreement or
15 some subsequent agreement. Suffice it to say that the evidence
16 is, and it is not disputed, that the plaintiff allocation
17 ultimately set aside \$4,450,000 for the payment of attorneys'
18 fees.

19 The firm of Lowey Dannenberg, the plaintiff here,
20 which played a prominent role in those insurance company
21 Rezulin cases received the \$4.45 million and put it in a
22 segregated account. In due course, the Dugan and Murray
23 defendants here asserted a claim which, stripped of some
24 verbiage, amounts to a claim to a third of that fund, more or
25 less. They filed the Louisiana action against Lowey Dannenberg

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1 seeking to recover what they concede to be their share of the
2 attorneys' fees generated by the insurance company settlement.

3 Lowey Dannenberg removed that action to the Federal
4 District Court for the Eastern District of Louisiana. The
5 multidistrict panel sent it to me as part of the Rezulin MDL.

6 In due course, I granted a motion to remand to the
7 Louisiana State Courts because I concluded that diversity of
8 citizenship was lacking.

9 Almost immediately upon the remand, Lowey Dannenberg
10 brought this action for interpleader against the Dugan and
11 Murray defendants and all other known claimants, actual or
12 possible, to the fund of attorneys' fees in this court and,
13 after some initial skirmishing, deposited not only the
14 \$4,450,000, but the interest earned thereon from the time of
15 deposit to the date of deposit into the registry of this court.
16 And they bring this motion for a preliminary injunction to
17 restrain any competing litigation, including the Louisiana
18 case.

19 Now, the standard that governs a motion for a
20 preliminary injunction is very straightforward. Plaintiff has
21 to show a threat of irreparable injury and either that it is
22 likely to prevail on the merits or, alternatively, that it has
23 raised serious questions that are a fair ground for litigation
24 and that the balance of hardships tips decidedly in its favor.

25 In this case, I find that there is, quite clearly, a

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1 threat of irreparable injury in the absence of a preliminary
2 injunction in that Lowey Dannenberg is subject to the
3 possibility of litigation, indeed, the likelihood of litigation
4 in multiple fora as competing claimants try to get their hands
5 on as much of the \$4.5 million fund as they can.

6 A number of arguments were raised in the defendants'
7 motion to dismiss the complaint for interpleader, but the
8 plaintiff amended the complaint, and the defendants have
9 acknowledged, and I appreciate the candor and frankness with
10 which they did so, that the filing of the amended complaint
11 unequivocally moots the motion to dismiss, which I have already
12 denied on that basis, and cures at least most of the defects,
13 perhaps all of the defects that originally generated the motion
14 to dismiss.

15 I should say a word parenthetically about
16 jurisdiction. The case is framed in the complaint and in the
17 amended complaint as a statutory interpleader. In a statutory
18 interpleader, the diversity of citizenship requirement is
19 merely that there be at least two claimants to the fund of
20 diverse citizenship, and there quite clearly are more than two
21 claimants to the fund who are of diverse citizenship.

22 I raised also the question of whether the case should
23 be considered under the rubric of rule interpleader and, in
24 fact, although the plaintiff didn't plead the case that way, it
25 seems clear to me that the requirements of rule interpleader

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1 and of subject matter jurisdiction for that purpose also are
2 satisfied.

3 Rule interpleader is appropriate under Rule 22 "where
4 persons have claims against a plaintiff such that the plaintiff
5 is or may be exposed to double or multiple liability." That is
6 surely the case here. The jurisdictional requirement in that
7 circumstance is a little bit different. It requires diversity
8 of citizenship between the plaintiff and each of the
9 defendants. One of the cases so holding is Correspondence
10 Services Corporation against First Equities Corporation of
11 Florida, 338 F.3d 119, 124 (2d Cir. 2003). I find the
12 diversity of citizenship requirement in that regard is
13 satisfied here, as is the requirement that the matter in
14 controversy, exclusive of interest and costs, exceeds \$75,000.
15 So subject matter jurisdiction exists in this case regardless
16 of whether this is treated as a statutory interpleader, as
17 initially pled, or as a rule interpleader, which also would be
18 available.

19 The defendants' only argument here today boils down to
20 a contention that it is within the discretion of this court to
21 decline, and at this point I am not quite clear on the
22 argument, but it is to decline either jurisdiction altogether
23 or to decline to issue the injunction because interpleader
24 invokes the court's equitable jurisdiction and the plaintiff is
25 forum shopping. Well, that is a singularly unpersuasive

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1 argument, admirable although it may be for creativity.

2 It is certainly true that the plaintiff did not seek
3 an injunction until after I remanded what began as the
4 Louisiana case to the Louisiana State Court. But in view of
5 the previous proceedings in that case, there was absolutely no
6 reason for them to do so, because they had every reason to
7 believe and understand that the Louisiana case in fact could be
8 litigated in this court before me.

9 They removed the Louisiana case to the Eastern
10 District of Louisiana. They sought a stay from Judge Fallon,
11 pending action by the multidistrict panel, on the theory that
12 the case belonged in New York with the Rezulin MDL. They asked
13 the multidistrict panel to move the case here, the
14 multidistrict panel did so, and so there was just no need to
15 apply for an injunction.

16 Only when I perhaps surprised them, but in any case,
17 surprise or not, remanded the case was there really a serious
18 prospect of litigation in multiple fora, and they moved
19 absolutely as quickly as anyone reasonably could have asked
20 them to move.

21 So even assuming for the sake of argument that it
22 would be appropriate as a matter of law for me to decline
23 either to exercise my jurisdiction in general or to grant a
24 preliminary injunction on the grounds generally asserted by the
25 defendants, this is not a case in which it would be appropriate

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1 for me to do that.

2 Moreover, as my colloquy with Mr. Ciolino suggested,
3 it is absolutely clear that even if the plaintiff was forum
4 shopping and seeking to get the case to this court, I would
5 observe that not all forum shopping is wrong. Sometimes it is
6 really downright scurrilous, but in this case it is downright
7 rational and appropriate.

8 The fact of the matter is that, for better or for
9 worse, I have been presiding over the Rezulin matter for years,
10 I presided over all meaningful proceedings in the part of the
11 Rezulin litigation that yielded the fee fund that is at issue
12 in this case. Without meaning to claim any special brilliance
13 or anything on my part, I am the judge who in fact saw the work
14 product, the value of which presumably will be at issue in
15 allocating the fund. I have intimate familiarity, like it or
16 not, with all of the ins and outs of the Rezulin litigation,
17 and there is just no question that the interests of judicial
18 economy would be dramatically served by having this dispute
19 resolved before me as opposed to asking one of my state court
20 brethren in Louisiana to master the ins and outs of a
21 litigation which at its peak had well over a thousand cases
22 before me and attempting to sort out of all of that the rights,
23 the wrongs and the values related to the fee claim.

24 So for all those reasons, the motion for a preliminary
25 injunction is granted.

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1 Furthermore, it is granted without any requirement of
2 security, because the dispute is over the fund and the fund is
3 in the registry of the court, so the defendants are not exposed
4 to any meaningful risk of loss in the event this preliminary
5 injunction has been wrongfully or erroneously issued. And the
6 defendants, again commendably, frankly acknowledge that. The
7 temporary restraining order bond is exonerated on consent.

8 Folks, now I guess all we need to do is to set a
9 schedule, so I will be happy to hear you on that.

10 MR. COHEN: Thank you, your Honor.

11 THE COURT: Oh, and there is one other thing I would
12 ask you, Mr. Cohen, and that is this: At one point in your
13 remarks you said something about the matter being ripe not only
14 for a preliminary but for a permanent injunction. That is, in
15 effect, I believe, the substantial equivalent of asking me for
16 summary judgment, isn't it, not as to the allocation of the
17 fund but as to a part of the relief?

18 MR. COHEN: Correct, your Honor.

19 THE COURT: Is there an objection on the part of the
20 defendants to the injunction being permanent as to litigation
21 in other forums? After all, the fact of the matter is that the
22 fund is here, and there will be an adjudication allocating it,
23 and that will be that. So I don't know what your pleasure is,
24 Mr. Ciolino.

25 MR. CIOLINO: Your Honor, this is a preliminary

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1 injunction. It is in effect throughout the pendency of these
2 proceedings, and at the end of proceedings the fund is
3 distributed. So I don't see any reason why we can't call it a
4 permanent injunction because at the end of the proceedings the
5 res is distributed anyway.

6 THE COURT: Then on that basis, I will make it
7 permanent. And if for some totally unforeseen reason this
8 lawsuit in other respects ends without an allocation of the
9 fund or an adjudication of the respective rights of the
10 parties, you have the ability to come back under Rule 60 if
11 that's appropriate.

12 Mr. Cohen.

13 MR. COHEN: Thank you, your Honor. We did, in the
14 hopes that you would agree to release the security on TRO,
15 prepare a proposed order to that effect, which I would like to
16 hand up.

17 THE COURT: Sure.

18 MR. COHEN: Your Honor, I have not conferred with any
19 other counsel on this, but given the limited nature of what we
20 are dealing with, I would propose 60 days as the discovery
21 period. I don't really see the need for more than that.

22 THE COURT: Let's get the reaction to this order. Any
23 problem with this order?

24 MR. CIOLINO: None at all, your Honor.

25 THE COURT: All right.

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1 Okay. Any need for more than 60 days on discovery?

2 MR. CIOLINO: No, your Honor. That would be good.

3 THE COURT: So discovery cutoff will be March 31,
4 pretrial order, requests to charge, if that's appropriate,
5 proposed jury instructions, if appropriate -- that's what I
6 just said, isn't it -- and summary judgment motions by April
7 30.

8 Has anybody demanded a jury in this case?

9 MR. COHEN: We have not, your Honor.

10 THE COURT: Is there going to be --

11 MR. CIOLINO: Your Honor, we have not even considered
12 it yet. So I can't speak to that issue at this point.

13 THE COURT: Think about how some of our citizens here
14 would relish serving on a jury dispute in a fight between
15 prosperous lawyers over \$4.5 million.

16 MR. CIOLINO: Yes, your Honor.

17 THE COURT: Anything else?

18 MR. COHEN: Nothing here, your Honor. Thank you.

19 THE COURT: Do you want to go to a magistrate judge
20 and see if you can settle this?

21 MR. COHEN: No objection, your Honor.

22 MR. CIOLINO: No objection to that, your Honor.

23 THE COURT: Okay. I will do the reference and you
24 will hear from the magistrate judge.

25 Thanks very much.

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